

1 THE HONORABLE THOMAS S. ZILLY  
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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 HARMONY GOLD U.S.A., INC.,  
12 Plaintiff,  
13 v.  
14 HAREBRAINED SCHEMES LLC,  
HAREBRAINED HOLDINGS, INC.,  
JORDAN WEISMAN, PIRANHA GAMES  
INC., INMEDIARES PRODUCTIONS,  
LLC, and DOES 1–10  
15 Defendants.

16 CASE NO. 2:17-cv-00327-TSZ

17 **PLAINTIFF HARMONY GOLD  
18 U.S.A. INC'S SURREPLY IN  
19 SUPPORT OF OPPOSITION TO  
20 MOTION FOR SUMMARY  
21 JUDGMENT AND MOTION TO  
22 STRIKE PURSUANT TO LOCAL  
23 RULE 7(G)**

24 **NOTE ON MOTION CALENDAR:  
25 DECEMBER 22, 2017**

1 Pursuant to Local Rule 7(g), Plaintiff Harmony Gold U.S.A., Inc. respectfully asks this  
 2 Court to strike: (1) the Harebrained Defendants' Reply in Support of Defendant Piranha Games,  
 3 Inc.'s Motion for Summary Judgment, in its entirety, because the Harebrained Defendants make  
 4 an entirely new legal argument for the first time on reply; and (2) Paragraph 2 of the Declaration  
 5 of Todd S. Fairchild, and the corresponding references to the same on page 9, lines 24-25  
 6 through page 10, line 1, of defendant Piranha's Reply in Support of Piranha's Motion for  
 7 Summary Judgment, because Piranha improperly introduces new (and misleading) evidence on  
 8 reply. In the alternative to its requested relief under (2), above, Harmony Gold seeks leave to file  
 9 the attached Supplemental Declaration of Jessica Stebbins Bina to clarify and respond to  
 10 testimony contained in the Fairchild Declaration.

11 **I. REQUEST TO STRIKE HAREBRAINED DEFENDANTS' REPLY.**

12 The Harebrained Defendants did not originally file a motion for summary judgment.  
 13 Instead, they merely joined in defendant Piranha's motion. Dkt. 54. Piranha's motion, in turn,  
 14 seeks summary judgment *solely* on the basis that Harmony Gold lacks standing to pursue this  
 15 action because it is not the owner or exclusive licensee of the copyrights it seeks to enforce. Dkt.  
 16 47. The Harebrained Defendants' Reply, however, seeks summary judgment on an entirely new  
 17 basis—that the Harebrained Defendants' designs are not substantially similar to Harmony Gold's  
 18 copyrighted works. Dkt. 76 at 2-6.

19 Introduction of an entirely new legal theory on reply is wholly improper and *especially*  
 20 inappropriate in the summary judgment context. *United States v. Cox*, 7 F.3d 1458, 1463 (9th  
 21 Cir. 1993) ("party may not make new arguments in the reply brief"); *Provenz v. Miller*, 102 F.3d  
 22 1478, 1483 (9th Cir. 1996) (allowing new materials in a summary judgment reply without  
 23 affording opportunity to respond "would be unfair"). Accordingly, the Harebrained Defendants'  
 24 Reply brief should be stricken in its entirety. *See Cox*, 7. F.3d at 1463; *see also, e.g., Pease &*

25 *Sons, Inc. v. Travelers Indem. Co. of Connecticut*, No. C14-1562 TSZ, 2015 WL 12001271, at n.

1 2 (W.D. Wash. Jan. 16, 2015) (Zilly, J.) (new arguments first raised in reply will not be  
 2 considered by the Court); *Nw. Coal. for Alternatives to Pesticides v. U.S. E.P.A.*, No. C10-1919  
 3 TSZ, 2014 WL 309168, at \*4 (W.D. Wash. Jan. 28, 2014) (Zilly, J.) (granting motion to strike  
 4 “new argument improperly raised for the first time in Intervenor’s reply”); *Docusign, Inc. v.*  
 5 *Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006) (Zilly, J.) (granting motion to strike  
 6 new evidence and arguments presented for the first time in reply).

7 The Harebrained Defendants attempt to evade the well-established rule against raising  
 8 new arguments on reply by claiming that they learned for the first time in Harmony Gold’s  
 9 opposition brief that Harmony Gold is alleging infringement of its exclusive rights of  
 10 reproduction, distribution, display, and merchandizing, as opposed to the right to create  
 11 derivative works. Dkt. 76 at 2. This assertion is nonsense. Not only have the parties discussed  
 12 this issue for months leading up to this motion, *see* Dkt. 52 ¶¶ 4-7, but Harmony Gold’s  
 13 operative complaint seeks to validate these exact rights, *see* Dkt. 31 ¶ 37 (“Defendants have  
 14 infringed Harmony Gold’s copyrights to these warrior robots through their unauthorized  
 15 copying, distribution, and display of warrior robots that are substantially similar to those owned  
 16 by Harmony Gold”), and Harmony Gold seeks to further clarify the rights it seeks to enforce  
 17 through its currently pending motion to amend, *see* Dkt. 51.<sup>1</sup> Furthermore, and even were it  
 18 otherwise, the Harebrained Defendants cannot add a new *substantive* ground for summary  
 19 judgment—lack of infringement—to a motion for summary judgment based on *standing*. The  
 20 Harebrained Defendants’ Reply brief should be stricken.

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 23 <sup>1</sup> Moreover, the suggestion that an exclusive license holder cannot sue for infringement of the rights of reproduction,  
 24 display, and distribution, merely because the alleged infringing work differs *enough* to constitute a derivative  
 25 work—even if it remains “substantially similar” to the original work—is legally frivolous. Such a rule would  
 eviscerate copyright law and render all exclusive licenses that license less than the entire bundle of Section 106  
 rights unenforceable. *See* 17 U.S.C. § 106; *see also* *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997,  
 1003 (9th Cir. 2015) (“It is established law under the 1976 [Copyright] Act that any party to whom such a right  
 [under § 106] has been transferred — whether via an assignment or an exclusive license — has standing to bring an  
 infringement action based on that right.”).

1           **II. REQUEST TO STRIKE PORTIONS OF PIRANHA'S REPLY AND FAIRCHILD**  
 2           **DECLARATION.**

3           In defendant Piranha's Reply, and in the accompanying Fairchild Declaration, Piranha  
 4 asserts that Harmony Gold should be denied Rule 56(d) discovery because it was not diligent in  
 5 seeking that discovery. Specifically, Piranha's counsel testifies, for the first time on reply, that  
 6 "Ms. Stebbins Bina stated that Harmony Gold would not spend the time or resources necessary  
 7 to obtain [critically important and relevant third party] documents unless defendants were to file  
 8 a dispositive motion." Dkt. 75 ¶ 2, *see also* Dkt. 74 at p. 9-10. This assertion is inaccurate, and  
 9 is based on a misleading construction of a statement Ms. Bina made in the context of a settlement  
 10 discussion. *See* Ex. A ¶¶ 2-6. Harmony Gold respectfully requests the Court either strike Mr.  
 11 Fairchild's new testimony, and its incorporation into Piranha's Reply, or alternatively grant  
 12 Harmony Gold leave to respond through the attached proposed Supplemental Declaration of  
 13 Jessica Stebbins Bina. *See Provenz*, 102 F.3d at 1483 (when new evidence is submitted on reply,  
 14 opposing party should, at minimum, be given an opportunity to respond).

15           **III. CONCLUSION.**

16           For the foregoing reasons, Harmony Gold requests the Court grant the relief requested in  
 17 this surreply.

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1 DATED: December 27, 2017.

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14 *Attorneys for Plaintiff Harmony Gold U.S.A., Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on December 27, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the CM/ECF participants.

DATED this 27th day of December, 2017.

*s/ Mary J. Klemz*

Mary J. Klemz